IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 79 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASARAFKHAN RUSTAMKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:
MR BM GUPTA for appellant
MR RM CHAUHAN, APP for Respondents

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE J.R.VORA

Date of decision: 25/02/2002

ORAL JUDGEMENT (Per : MR.JUSTICE J.M.PANCHAL)

1. Admitted. Mr. R.M. Chauhan, learned APP waives service of Notice on behalf of the respondents. Having regard to the facts of the case, the Appeal is taken up

for final disposal today.

2. By filing this Appeal under Section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated November 5, 2001 rendered by the learned Addl. City Sessions Judge, Court No.9, in Session Case No. 299/2000 by which he is convicted of the offence punishable under Section 8(c) read with Section 21 of the NDPS Act, 1985 and punished with RI for 10 years and fine of Rs.1 lac in default RI for 2 years as he was found in concious possession of 154.6 grams of a narcotic substance namely Brown Sugar.

3. On the basis of secret information received by Police Inspector Mr. Rajvanshi, the appellant was arrested on May 30, 2000 and found in possession of 154.6 grams of Brown Sugar without pass or permit. After usual investigation and submission of chargesheet, the appellant was tried of the offence punishable under Section 8(c) read with Section 21 of the NDPS Act, 1985. On appreciation of evidence, the learned Judge has accepted the case of the prosecution and convicted the appellant as mentioned above. At the time of hearing of the appeal, the learned counsel for the appellant has not challenged the finding recorded by the learned Judge on merits at this stage but argued that the provisions of Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 are applicable to the facts of the present case, according to which, where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, the punishment can extend to 10 years and as the learned Judge has proceeded on the footing that the provisions of the unamended Act are applicable to the facts of the present case and not heard the appellant on the question of sentence, the matter be remanded to the learned Judge for reconsidering the question of sentence to be imposed on the appellant. Heard the learned counsel for the parties. The operative part of the order passed by the learned Judge is in the following terms :

> "The prosecution succeeds. The accused is hereby found guilty of having committed an offence punishable under the provisions of Section-8(c) read together with Section-21 of the Narcotic Drugs and Psychotropic Substances Act, on account of being found in conscious possession of 154.6 gms. of a Narcotic Substance being Brown Sugar. The accused is hereby convicted to undergo Rigorous Imprisonment for ten years and is further imposed a fine to the tune of Rs.

1,00,000/- and in default thereof, the accused is ordered to undergo Rigorous Imprisonment for a further period of two years. The period for which the accused has been detained in Judicial Custody is ordered to be set-off while computing the total period of sentence. Since this Court is imposing the minimum punishment as prescribed under the relevant provisions of the NDPS Act, there is no necessity of hearing the Learned Advocate for the accused on the aspect of quantum of punishment.

The muddamal articles are ordered to be appropriately disposed of after the expiry of the appeal period.

Pronounced in the Open Court on this 5th day of November, 2001.

(P.B. Desai)
Addl. City Sessions Judge
Court No.9."

4. A bare reading of the above quoted order makes it evident that the learned Judge has proceeded on the footing that amended provisions of the NDPS Act, 1985 are not applicable to the facts of the present case and as the learned Judge was inclined to impose the minimum punishment as prescribed under the unamended provisions of the Act, he had not heard the learned counsel for the appellant on the aspect of quantum of punishment.

5. From the record of the case, it is also evident that the appellant had submitted an application dated November 27, 2001, pointing out to the learned Judge that the provisions of the NDPS Act, 1985 as amended by NDPS (Amendment) Act, 2001 are applicable to the facts of the present case and as the Court has discretion in the matter of imposing sentence, a lenient punishment should be imposed on the appellant. Having regard to the facts of the case, the learned Judge had heard the learned counsel for the appellant as well as the learned Public Prosecutor and found substantial merits in what was pleaded on behalf of the appellant in application dated November 27, 2001, but rejected the application vide order dated December 27, 2001 by holding that review in criminal matter is prohibited by the provisions of Section 362 of the Code of Criminal Procedure. The appellant has produced the said order on the record of the case as Annexure-B to the memorandum of appeal.

6. The Parliament has enacted the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001. Section

41 sub-section (1) of the Amending Act reads as under :

41.(1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence :

Provided that nothing in this section shall apply to cases pending in Apepal."

The Ministry of Finance (Department of Revenue) has issued Notification dated September 27, 2001 in exercise of the powers conferred by sub-section (2) of Section 1 of the ND & PS (Amendment) Act, 2001 appointing October 2, 2001 as the date on which the said Act has come into force in the whole of India. In the present case, the trial against the appellant had concluded on November 05, 2001 but before that date the Amending Act had come into force and therefore in view of the provisions of Section 41 of the Amending Act, there is no manner of doubt that the case of the appellant ought to have been disposed of in accordance with the provisions of the Principal Act as amended by the Amending Act and the question of punishment ought to have been considered in the light of provisions of the Amending Act. Section 21 after the new Amendment is as under :

"21. Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable --

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with

both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

In exercise of the powers conferred by the clauses (viia) and (xxiiia) of Section-2 of the NDPS Act, 1985 and in supersession of Ministry of Finance, Department of Revenue Notification SO 527(E) dated 16th July, 1996, the Central Government has, by a Notification S.O.1055(E) dated October 19, 2001, specified the quantity mentioned in columns 5 and 6 of the Table prescribed below it, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. As per the table, so far as Heroin is concerned, the small quantity specified is 5 grams whereas commercial quantity specified is 250 grams. There is no manner of doubt that what was found from the possession of the appellant was 154.6 grams of Brown Sugar and the contravention involves quantity, lesser than commercial quantity but greater than small quantity. Therefore, the rigorous imprisonment could have extended to 10 years and with fine which could have extended to Rs. 1 lac. The learned Judge has proceeded on the footing that the provisions of unamended Principal Act are applicable to the facts of the present case and, therefore, has not

heard either the appellant or his learned counsel on the aspect of quantum of punishment. The appellant is entitled to point out that for the reasons stated by him

the imprisonment for a term should not extend to 10 years and that the fine also should not extend to Rs. 1 lac. Under the circumstances, we are of the opinion that in view of the amended provisions of NDPS Act, 1985, the learned Judge was not justified in imposing the minimum punishment as prescribed under the unamended Principal Act. Having regard to the facts of the case, we are of the opinion that interest of justice would be served if the matter is remanded to the learned Judge for reconsidering the aspect of quantum of punishment to be imposed on the appellant.

7. For the foregoing reasons, the Appeal succeeds as indicated above. The decision on merits at this stage is not challenged by the learned counsel for the appellant and therefore the findings recorded by the learned Judge on merits are not interfered with at all at this stage. The matter is remanded to the learned Judge who shall consider the aspect of the imposition of punishment in the light of amended provisions of Section 21 of the Act and the circumstances which may be pointed out by the appellant regarding imposition of sentence on him. It is clarified that after the fresh order is passed by the learned Judge of the Trial Court imposing punishment, it would be open to the appellant to challenge the legality of the judgment including merits of the case before the appropriate forum. The appellant shall be heard regarding imposition of sentence by the learned Judge as early as possible and without any avoidable delay. Appeal is accordingly allowed.

(J.M. Panchal, J.)

(J.R. Vora, J.)

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